

No. 14985.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ADRIAN SCOTT,

*Appellant,*

*vs.*

RKO RADIO PICTURES, INC., a corporation,

*Appellee.*

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## APPELLANT'S REPLY BRIEF.

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### Introduction.

Respondent's reply brief fails to notice the fundamental contentions underlying the appeal. While including evidentiary matter and, in an Appendix spread over thirty-four pages, direct quotation from defendant's exhibits, respondent has left untouched the following underlying arguments: (1) the existence of moral turpitude, in the present appeal, presented a question of fact (App. Op. Br., pp. 30 *et seq.*); (2) the *Cole* (185 F. 2d 641) and *Lardner* (216 F. 2d 814) decisions have been, on the point here involved, overruled by the *Slochower* decision in the Supreme Court (350 U. S. 551); and (3) failure to invoke the Fifth Amendment cannot itself make "moral turpitude" as a matter of law of a refusal to answer based on the First Amendment.

Respondent's failure to answer these arguments is especially noteworthy in view of appellant's specific statement (App. Op. Br., p. 42) that the jury's determination of the facts was proper, and there was no basis for setting aside the original verdict. At bottom of appellant's contentions is, among other things, the Seventh Amendment of the Constitution of the United States and the fundamental distinction between the functions of a court and that of a jury. (See *Baltimore v. Redman*, 295 U. S. 654, at p. 657.)

### I.

#### **The Lardner and Cole Decisions Do Not Govern This Appeal.**

Respondent's reliance on the *Lardner* and *Cole* decisions is unfounded, and in any event cannot afford any basis for overturning the jury's verdict in favor of plaintiff.

#### **(a) The Slochower Decision Is Irreconcilable With Cole and Lardner and the Latter Decisions Must Be Deemed Overruled.**

Slochower emphatically condemned the practice of imputing any reprehensible motive to a witness who refused to disclose whether he had been a member of the Communist Party, thus giving the highest support for what each jury who has tried any of the contract cases have found in their verdicts. This was true in *Cole* and in *Lardner*; the same jury which returned the *Lardner* verdict found similarly in the Scott case on the question of breach.)

The *Cole* decision said tentatively (the case was remanded for re-trial on the question of breach), and the

*Lardner* decision expressly held, that refusal to answer questions concerning membership in the Communist Party was conduct involving moral turpitude. Slochower holds just the contrary. It is true that in *Slochower* the witness invoked the Fifth Amendment, while Scott did not invoke that Amendment, but suggested reliance on the First Amendment. It should be remembered that the decision establishing the Fifth Amendment as a shield against these interrogations by Congressional Committees had not been rendered at the time Scott was compelled to decide on a course of conduct. *Blau v. United States*, 340 U. S. 159 (decided Dec. 11, 1950).

But in any event, it is the refusal to answer concerning party affiliation, whether or not the proper Amendment is invoked, which is the heart of the matter. The existence of moral turpitude cannot turn on nice distinctions, such as asserting a privilege or a challenge to a Congressional Committee with the technical precision which, now, hindsight makes possible.

The authorities cited in Appellant's Opening Brief (pp. 31, *et seq.*) and numerous others readily at hand say that moral turpitude is keyed to "commonly accepted mores" (*U. S. v. Francioso*, 164 F. 2d 163) and to the common conscience; that moral turpitude involves "an act of baseness, violence, or depravity" (see *In re O'Connor*, 184 Cal. 584, 194 Pac. 1010). Scott's failure to invoke the Fifth Amendment could not make his refusal to answer depraved, base, or vile.

It is submitted that the *Lardner* and *Cole* cases, insofar as they say or hold otherwise, must be deemed overruled by Slochower.

**(b) In Any Event, the Cole and Lardner Decisions Are Not Applicable.**

Appellant has pointed out (Op. Br. pp. 31-33) significant differences between the Lardner contract and the Scott contract. Specifically, nothing is said in the Scott contract concerning an *offense*, or moral *turpitude*. Respondent says nothing about differences, but argues that in other respects the morals clauses of the two contracts were similar. (Resp. Br. p. 39.) Such an argument is clearly inadequate. The inclusion in Lardner's contract of significant differences in substance cannot be eradicated by showing that in other respects they were similar.

Respondent next argues that Scott's conduct was similar to the conduct of the plaintiff Cole in the *Cole* case and plaintiff seeks to construe the *Cole* decision as holding that Cole's conduct constituted a breach of the morals clause in that contract as a matter of law. But this argument must fail for two reasons. First, the *Cole* decision does not so hold, as will be shown. Second, moral turpitude being a matter of depravity, baseness, a quality of the heart—no prefabricated standard can be imposed, except perhaps in arrant cases; each man is entitled to be charged and tried as an individual.<sup>1</sup> The jury had a right to find, after a full trial, that whatever ignorance or errors in law Scott's counsel may have suffered from, Scott was not guilty of moral turpitude and did not offend against common decency.

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<sup>1</sup>Cf. the following from *Lardner*: “. . . the facts of the *particular crime* of Lardner in refusing . . . to tell the Committee . . . should be held moral turpitude as a matter of law . . . on the record of Lardner's actions before the Congressional Committee . . .” (*id* p. 852).

The *Cole* decision did not hold that refusal to answer constituted a breach of the morals clause as a matter of law. This is plain from the opinion. This court said: "There is no room for doubt as to just what Cole did before the Committee", and having thus eliminated from the case any question of Cole's conduct, the court remanded the case for re-trial (185 F. 2d 662). This order was inconsistent with a holding that his indisputable conduct constituted a breach, because a re-trial would have served no purpose. Indeed, this court said:

"Since the view which we take of the *whole* case requires us to order a new trial, upon which it may well be that the issues will be enlarged, we think it unnecessary to pass upon the contention that no issue whatever relating to waiver should have been submitted to the jury." (*Id.* p. 660.)

Finally, this court in *Lardner* compared the morals clause in that case with that in the *Cole* decision, and said that "Lardner's contract said everything that Coles said *and a little more*" (216 F. 2d at p. 848).

Cole's and Scott's contracts are identical in these particulars: neither includes the language concerning *offense* or moral turpitude. It is plain that the Lardner contract is different in substance from Scott's and contains "a little more."

**(c) The Failure to Answer Concerning Membership in the Writer's Union Is Not a Violation of the Morals Clause**

Respondent implies that in any event Scott's conviction for refusal to answer whether he was a member of the Screen Writer's Guild gave his employer a right to discharge him. (Resp. Br. p. 40.) No argument or authority

in support of this contention is given, and it is submitted that this contention is unfounded.

Even if, contrary to *Slochower*, and the trend of the decisions in the Supreme Court, an inference of membership in the Communist Party is permissible from refusal to answer, and if such an inference is likewise permissible concerning membership in a writer's union, nothing in the record or in the briefs suggests any impropriety by reason of such membership. The instruction given by the trial court in this case that the jury could take judicial notice that a substantial segment of the American public looked with scorn and contempt on Communists [R. pp. 1101-1102] cannot be transferred to membership in a labor union.

A conviction of contempt for refusal to answer a question concerning union membership must fall under *Sinclair v. U. S.*, 279 U. S. 633, as construed in *U. S. v. Murdock*, 290 U. S. 389, at p. 397, in which it was said:

“He refused to answer certain questions not because his answers might incriminate him, for he asserted they would not, but on the ground the questions were not pertinent or relevant to the matters then under inquiry. The applicable statute did not make a bad purpose or evil intent an element of the misdemeanor of refusing to answer, but conditioned guilt or innocence solely upon the relevancy of the question propounded.” (78 Law Ed. 386.)

II.

**The Order Granting a New Trial and Setting Aside the Verdict Was Erroneous; the Verdict Should Be Reinstated.**

**(a) There Was No Conflict in the Evidence Warranting Judicial Interposition.**

In his Opening Brief appellant has argued at some length that the jury's answer to the special interrogatory finding there was no breach was a determination of fact, and that the presence or absence of moral turpitude in the circumstances of this case, was likewise a question of fact. (App. Op. Br. pp. 30-35.)

Respondent's failure to reply must be taken as conceding these contentions. Further argument from appellant on these points would seem improper.

Respondent says, however, that in passing on the motion for new trial the court passed on "many disputed points" of evidence. But respondent does not cite a single point on which the evidence was in dispute on the question of breach. There was, in fact, no dispute in the evidence, and in view of the fortunate manner of presentation there could be no dispute, as to what Scott did or the circumstances in which it was done.<sup>2</sup> The jury saw and heard motion pictures and dialogue of the very scene and conduct in question, and in addition, had a complete transcript of the entire proceedings.

It is true, differences of editorial opinion concerning Scott's conduct (and the conduct of other witnesses) were

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<sup>2</sup>The same motion pictures were exhibited in *Lardner*, and in that case this court said there was "no dispute as to what the ten men did" (216 F. 2d 850-851).

printed in the press (one extreme of which is reproduced by respondents in the Appendix to its brief). But the comments of onlookers did not alter the facts.

There was no issue of fact to resolve as to what the conduct of the men was. The decisive issue was only whether that admitted and indisputable conduct constituted moral turpitude, for unless Scott's conduct was immoral, depraved, or vile, it could not violate any part of the morals clause. Scott contracted to conduct himself with due regard to public conventions and morals; not to do anything tending to discredit him, or to bring him into disrepute, contempt, or scorn, or tending to shock, insult, or offend the community or public morals, or which would prejudice his employment or the motion picture industry. (The morals clause is reprinted in full at App. Op. Br. pp. 3, 29). But Scott's conduct could not do or be anything forbidden by his contract unless the quality of his conduct was such as to bring it within the base and vile character of moral turpitude.

It seems perfectly clear that the trial court disagreed with the jury, not concerning disputes in the evidence, nor on the weight of the evidence, but on the question whether Scott's undisputed conduct constituted moral turpitude or was actuated by a sinister motive. The trial court was explicit:

"In the case of Adrian Scott the jury found there was no violation of the morals clause of the contract and no waiver. That brings us back to the question of whether there was or was not a violation of the morals clause. In view of the language of Judge Pope in the Cole case I feel the great weight of the evidence indicates there was a violation of

the morals clause of the Adrian Scott agreement and I so find”

“ . . . I am not so sure in my own mind, on the issue of the violation of the contract, that the court itself may not have been guilty of error. I denied the defendants the right to introduce evidence as to the *motive* for the plaintiffs’ conduct before the Congressional Committee.” (Italics ours.)

“ . . . I know if these men could have denied the charge they would have been happy to have done so; and if they had been men of courage they would not have denied their membership, either past or present, in the Communist Party.” (*Lardner*, Vol. III, pp. 1134-1135.)

In fairness to the learned judge who tried the case below it should be pointed out that the language quoted above was spoken prior to the Supreme Court’s strong admonition in *Slochower*. However the trial court’s sentiments might have seemed before the Supreme Court spoke, it is submitted that the court’s order was erroneous and that the error should now be remedied.

**(b) The Asserted Ground for the New Trial, “To Prevent a Miscarriage of Justice” Fails of Specification and Is Without Support.**

Respondent asserts that the order granting a new trial was made on the further ground that to permit the verdict to stand would be a miscarriage of justice. This ground, if it be a ground at all, was not included among the grounds of respondent’s motion [R. pp. 38-41].

Furthermore, an asserted “miscarriage of justice” is an epithet, not a specification. Unless some error in law

or claimed insufficiency be pointed out, the phrase can only state respondent's displeasure with the verdict, and cannot support a judicial order.

In *Marshals etc. v. Cashman*, 111 F. 2d 140 (C. C. A. 10th, 1940), the trial court had granted a new trial after a jury had returned a verdict for the defendant; on retrial a new jury returned a verdict for the plaintiff. The Tenth Circuit, on review, reversed and instructed the trial court to vacate the order setting aside the first verdict and to reinstate that verdict in favor of the defendant. In discussing the court's action in setting aside the first verdict, the court said:

"The second ground in the motion was mistake and prejudice on the part of the jurors. Mistake and prejudice in what respect? Nothing whatever was set up.

". . . The fourth and last ground was that the verdict was secured by false testimony offered by defendant. What testimony? Coming from what source? Given by what witness or witnesses? False in what respect? The motion was completely silent. The evidence presented conflicts, but they were not extraordinary or substantially different from those frequently present in the trial of commonplace cases. Litigation would become interminable if trial courts shall take it upon themselves to set aside every verdict where the evidence is conflicting.

"It is manifest that on clear considerations the motion was inadequate and defective in essential respects and failed to meet recognized requirements for such a pleading. The granting of it exceeded the exercise of sound judicial discretion; it constituted an abuse of discretion." (111 F. 2d at p. 142.)

Compare *Sachs v. Ohio Nat'l Life Ins. Co.*, 2 F. R. D. 348.

Finally, it should be pointed out that the trial court in granting the motion for new trial did not purport to act on its own initiative, but on the contrary, ordered that "*said motion* for new trial be granted." [R. p. 46.]

In any event, the trial court could not on its own initiative set aside the verdict, after the lapse of ten days from entry of judgment. (F. R. C. P., Rule 59(d); *Marshal's etc. v. Cashman, supra*, at p. 142.) The order granting the new trial was made on April 28; the verdict of the jury was filed February 15, and the original judgment on the verdict was entered on February 28, 1952. (Stipulation to augment record Sept. 17, 1956.)

**(c) The Lardner Opinion Does Not Support the Order for a New Trial.**

Respondent further urges that in its motion for a new trial it relied upon specific errors, and that "certain of these contentions" were held sound in *Lardner*. (Resp. Br. p. 38.) Respondent does not, in this one-sentence declaration nor elsewhere in its brief, assert that any of its specifications upheld in the *Lardner* decision are applicable to Scott's case or that they answer any of appellant's contentions. However, we shall examine the motion for new trial and the holdings in *Lardner* to determine whether any of them can support the order granting a new trial in Scott's case.

This court, in the *Lardner* appeal, specified and considered five points (216 F. 2d 848-849). The first two points related to the jury's determination that Lardner's

employer had waived any breach. Those points are not applicable to this appeal, because the jury determined the waiver issue against plaintiff.

This court in *Lardner* then held, citing *Board of Education v. King*, 82 Cal. App. 2d 857, to the contrary, that the record of Lardner's conviction should have been admitted (*id.* p. 850), and that it was "unnecessary" for the trial court to instruct the jury that Lardner's "offense" involved no moral turpitude. But, in view of the *Slochower* holding, that "no sinister motive" can be imputed to refusal to answer, those holdings must now be re-examined and, it is submitted, cannot now be applied. In any event, this court's discussion in *Lardner* of all questions concerning breach, must be considered as this court intended them to be considered, as *dictum*, in view of the court's holding that "the particular crime of Lardner . . . should be held moral turpitude as a matter of law—not on the bare record of conviction, but on the record of Lardner's actions before the Congressional Committee." It is respectfully submitted that this holding is inconsistent with *Slochower* and should not now be followed.

The only other point discussed in the case was the evidence of the continued use of Lardner's name on motion pictures he had written. This court did not intimate that this admission constituted reversible error. Its statement that this testimony should not be admitted on re-trial was expressly stated to be based upon "this court's ruling on the breach", which, as we have argued, should no longer be held to be the law. In any event, since the re-trial of Lardner was limited to the question of waiver only, even

the caveat concerning that evidence can have no application to Scott's case, because the waiver point was determined in favor of plaintiff.

The respondent's specifications of grounds for the new trial contains no additional point supported on appeal. It should be remembered that the *Lardner* appeal involved the two fundamental questions of waiver and breach. What was said concerning waiver cannot be applicable on Scott's appeal; what was said concerning breach must, it is respectfully submitted, be re-examined in the light of *Slochower* and be governed by the decision of the Supreme Court.

**(d) No Inference Relevant to the Alleged Breach of Contract May Be Drawn as a Matter of Law From Scott's Failure to Answer.**

Respondent, compelled to accept the *Slochower* decision, argues that "all inferences except that of guilt are nevertheless permissible" (Resp. Br. p. 42) and cites a number of California decisions, all before *Slochower*.

Although respondent makes the general statement, it does not suggest any single inference which might have relevance to this appeal, other than the admittedly proscribed inference of guilt. It should also be pointed out that drawing inferences is clearly a fact finding function and the jury has determined the facts concerning breach in favor of plaintiff. No court should undertake, in a jury case, to substitute its inferences of fact in place of a jury's verdict.

A brief survey of the decisions will demonstrate that they are not in point.

*Fross v. Wooton*, 3 Cal. 2d 384, did not involve a refusal to testify before a Congressional Committee nor even a refusal to testify in a criminal proceeding. The case involved recovery of fraudulently concealed assets in a civil proceeding in which the defendant declined to testify. But it is not contended here that Scott declined to testify in the present civil action.

As in *Fross v. Wooton*, *supra*; *Spath v. Seager*, 39 Cal. App. 2d 10, was a civil action; but in that case no one declined to testify. The reviewing court merely said, in passing, that the plaintiff's failure to testify concerning an issue of his good faith was a tacit admission of bad faith (*id.* p. 14). The decision is remote from anything on this appeal.

*In re Berman*, 105 Cal. App. 37, holds contrary to respondent's contention. The court there said: "In other words, where the answer does have the tendency to criminate, it can make no difference what other purpose his silence serves" (*id.* p. 50). *Stillman Pond, Inc. v. Watson*, 115 Cal. App. 2d 440, does not, on careful reading, seem to have any relevance to the contention for which it was cited, other than a reference (at p. 450) that "Mr. Wilhoff did not testify in the hearing before the Commissioner", a fact from which no inference appears in the opinion.

*People v. Richardson*, 74 Cal. App. 2d 528 (erroneously cited as 34 Cal. App. 2d 528), was a criminal prosecution in which the court held that, although no inference of guilt of the offense charged could be drawn by reason of the claim of privilege, an instruction to this effect need not be given if there is evidence of flight from which the

inference of defendant's consciousness of guilt could be drawn (*id.* pp. 534-535).

It should be pointed out that the plaintiff was not asked any question in the case below which he declined to answer. If, in the case below, respondent had asked plaintiff a question which plaintiff had declined to answer, it might be fruitful to examine the pertinent authorities. But the refusal from which respondent seeks to draw inferences took place before a Congressional Committee. It is submitted that the *Slochow* decision is controlling.

### III.

#### **The Trial Court Did Not Purport to Make a Finding of Breach.**

Notwithstanding the prefix to the Findings of Fact and Conclusions of Law, the trial court made it plain that he treated the determination of breach as having been made for him by this court, and he did not independently find on the facts. "Finding" XI specifically says so; and the learned judge on re-trial made it as plain as language could do. [R. 129-130 quoted at App. Op. Br. pp. 40-41.]

Respondent's answers to appellant's contention does no more than to re-state the trial judge's conclusion of law, that is, that the evidence in the present case was the same as that in *Lardner*, and the trial court was bound by "this court's interpretation of similar evidence in the *Lardner* case." (Resp. Br. p. 35.)

We have shown that the evidence was not the same. The contracts were significantly different. And, there is no basis for assuming that the conduct, gesture, intonation, or manner of the two men as witnesses before the Con-

gressional Committee were the same. Even if motive were relevant, it cannot be said their motives were the same as a matter of law. We have also contended that so personal and punitive a determination as moral turpitude requires individual consideration. To impose this court's holding in the *Lardner* appeal to Scott would be as unwarranted as to transfer a finding of guilt in a criminal prosecution from one defendant to another.

But even if the evidence were identical in all respects (which it is not) this could not do away with the requirement for an independently determined finding of fact. (F. R. C. P., Rule 52(a); "A fair compliance with this rule is mandatory", *Smith v. Dental Products Co.*, 168 F. 2d 516; *Cafritz v. Koslow*, 167 F. 2d 749.)

### Conclusion.

Lawyers, trial courts, and intermediate courts of review are not often permitted the luxury of waiting until the Supreme Court has spoken on a difficult problem. In 1947, although there was condemnation of the Un-American Activities Committee from responsible sources (including the motion picture industry itself) Scott and his counsel were compelled to reach a decision without the definitive guidance of the court. The Committee's subpoena would not wait. But Scott's (and his counsel's) prediction of what a court would decide was wrong. Not until several years later was the privilege of the Fifth Amendment made secure in such cases; the effect of the First Amendment as a limitation on the powers of the Committee has not yet been finally decided.

This court, too, had to decide at least two appeals in motion picture contract cases, arising from the 1947

investigation, in advance of guidance from the Supreme Court. The Supreme Court has now indicated, in strong language, a point of view concerning refusal to disclose political affiliation under compulsion. It is a striking commentary on the perception of juries to observe that in each of the contract cases the verdicts have absolved the witnesses of iniquitous motives, exactly as the Supreme Court has now done.

It should be remembered that in 1947, and even during the period of the most intense feelings of the Cold War, scholars and publicists warned against some aspects of this Committee. Two juries, hearing three separate cases, with a fullness, accuracy and detail seldom approached, absolved the witnesses of wrongdoing at least to the extent of enforcing their contract rights.

In the present case, the trial court, acting before *Slochow* and believing himself bound by *Cole*, set aside the jury's verdict. We submit that action was founded on an erroneous conception of the law.

The judgment should be reversed with directions to reinstate the verdict in favor of plaintiff.

Respectfully submitted,

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